

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

Submitted on Briefs December 6, 2002 Session

**ALLEN P. BLY v. JIM KEESLING**

**Appeal from the Circuit Court for Sullivan County**  
**No. C2700 & C37751M     John S. McLellan, III, Judge**

**FILED DECEMBER 23, 2002**

**No. E2002-01115-COA-R3-CV**

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Allan P. Bly<sup>1</sup> (“Plaintiff”) sued Jim Keesling (“Defendant”) in Keesling’s official capacity as the Police Chief for the City of Kingsport . Defendant was investigating a rape which occurred in 1998. During the investigation and after DNA tests were conducted, Defendant was quoted in a local newspaper article as stating with certainty that Plaintiff was the rapist. Plaintiff sued alleging defamation of character and also claiming a violation of 42 U.S.C. § 1983, asserting he would not be able to obtain a fair trial as a result of the newspaper article. The Trial Court granted Defendant summary judgment after concluding the newspaper article did not have a negative impact on the criminal trial because the jurors had been questioned regarding whether they read the newspaper article. The Trial Court also concluded the defamation claim was barred by the Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-205(2). Plaintiff appeals the grant of summary judgment to Defendant. We affirm.

**Tenn. R. App. P. Appeal as of Right; Judgment  
of the Circuit Court Affirmed; Case Remanded.**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and HERSCHEL P. FRANKS, J., joined.

Allan P. Bly, *pro se*, Mountain City, Tennessee.

Julia C. West and M. Lacy West, Kingsport, Tennessee, for the Appellee Jim Keesling, Police Chief of the City of Kingsport, Tennessee.

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<sup>1</sup> In the pleadings and the documents on appeal, Plaintiff’s first name is spelled both “Allan” and “Allen”, and his last name is spelled both “Bly” and “Blye”. Other than the caption of the case and when quoting, we will refer to Plaintiff as “Allan” or “Allan Bly” when using his name.

## OPINION

### Background

Plaintiff, proceeding *pro se*, filed this lawsuit in the Circuit Court for Sullivan County at Blountville, Tennessee. Plaintiff's claims center around an article published in the Kingsport Times-News on February 11, 1999. The article discussed an investigation into the rape of a woman the previous year. In relevant part, the article reads as follows:

Police say a new DNA test is so conclusive that the chance a Kingsport rape suspect is not the rapist is virtually zero.

The test, called Short Tandem Repeat, compares the DNA strand of a sample taken from a crime scene to that of a suspect. The STR test compares the DNA strand at more sites than the test usually performed - the Polymerase Chain Reaction test.

Police say the STR test has allowed them to say with certainty that Allen P. Blye is the man who raped a woman last summer after breaking into her home.

Blye, 44, 316 Dunbar St., Kingsport, was indicted last month on aggravated burglary and aggravated rape charges following a June 1998 break-in at a house in the Garden Drive area, Police Chief Jim Keesling said Wednesday.

"The ratio of the suspect not being Allen P. Blye exceeds the current world population," Keesling said.

Blye, who was on parole from a burglary sentence when the rape occurred, was an initial suspect in the rape investigation, Keesling said, especially after he was arrested while in possession of a stolen vehicle in August. Keesling said detectives were investigating a string of stolen automobiles that had been abandoned in the area where the rape victim lives when the rape happened....

Plaintiff sued Defendant in his official capacity as Police Chief for the City of Kingsport. Plaintiff brought a federal claim pursuant to 42 U.S.C. § 1983, and also made a state law claim for "Slander, Libel, and Defamation of Character". Plaintiff claims Defendant knew criminal proceedings were pending and that Defendant's statements would prejudice Plaintiff's ability to receive a fair trial. Plaintiff also claimed the statements were made with actual malice and with the knowledge that the accusations would render any subsequent court action against Plaintiff unfair.

Apparently, Plaintiff's primary problem with the article was the complete lack of the use of the word "alleged" and the certainty with which it described Plaintiff as the rapist.

On January 24, 2000, Plaintiff filed interrogatories and requests for production of documents. Defendant filed his responses to these discovery requests on February 9, 2000. Plaintiff then filed a second set of interrogatories and requests for production of documents on March 20, 2000. Defendant never responded to this second discovery request. Defendant then filed a motion to dismiss claiming the Circuit Court in Blountville did not have subject matter jurisdiction over the claim and the lawsuit should have been filed in Kingsport. The Trial Court agreed and dismissed the lawsuit in April of 2000. Plaintiff filed a motion to alter or amend the judgment seeking to have the lawsuit transferred to Kingsport. Plaintiff also filed a new and identical lawsuit in the Circuit Court in Kingsport. The Trial Court, however, denied Plaintiff's request to transfer the lawsuit. Plaintiff appealed the dismissal of the lawsuit filed in Blountville. Defendant answered the new lawsuit filed in Kingsport and asserted, *inter alia*, that the claims were barred by the applicable statutes of limitations.

While the original lawsuit was pending, the legislature passed Tenn. Code Ann. § 16-1-116 which addresses the transfer of cases when a trial court determines it lacks jurisdiction. Defendant filed a motion with this Court acknowledging the appeal should be dismissed and the case remanded for further proceedings in conformity with Tenn. Code Ann. § 16-1-116. Upon remand, the original lawsuit was transferred to the Circuit Court in Kingsport.<sup>2</sup>

During the time the above-mentioned procedural quagmire was developing, Plaintiff was tried and convicted of aggravated burglary and aggravated rape. Thereafter, Defendant filed a motion for summary judgment claiming Plaintiff failed to allege a policy, procedure, or custom on the part of the City of Kingsport which in any way impaired Plaintiff's civil rights. Defendant asserted such an allegation was necessary in order to hold the City of Kingsport liable for Defendant's alleged actions. Defendant also stated in his motion:

At the [criminal] trial of the [rape and burglary] case the prospective jurors were questioned fully about any prior knowledge concerning the trial and if they heard anything about the case which would including (sic) reading anything in the newspapers, television, or discussing with a friend or anything of that nature. (See Criminal Trial Transcript, pp. 46-63) [The judge then questioned the alternate jurors and one] ... alternate juror said she could not remember having read about the case and the second alternate juror replied when asked if he had read or heard anything about the case "I don't remember, I don't remember", but said he seemed to remember something about

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<sup>2</sup> Although not entirely clear from the record, it appears the two lawsuits eventually were consolidated.

the case back when it happened. The juror said he could render a verdict based upon the evidence admitted.<sup>3</sup>

With regard to the defamation claim, Defendant asserted any statements made about Plaintiff in the newspaper article were true given the fact Plaintiff was convicted for the rape and, therefore, summary judgment on this claim was proper.

On November 8, 2001, Plaintiff filed a motion to amend the complaint seeking to sue Defendant individually rather than in his official capacity. Plaintiff sought to "substitute" the suit against Defendant in his "individual instead of official capacities (sic)." In the same document, Plaintiff opposed Defendant's motion for summary judgment by stating:

The Official Capacity/Immunity defense is defeated by Plaintiff's amendment, *supra*.

Plaintiff's injury claim is not moot and the harm will still occur because his conviction is not "final" until it is affirmed by the appellate courts. Plaintiff's criminal appeal has not been briefed.

Likewise, Defendants' "Voir Dire issue" has not been adjudicated by the appellate courts.

Plaintiff also asked the Trial Court to hold the present case in abeyance pending the appeal of his criminal conviction or, in the alternative, to grant a non-suit without prejudice.

On November 21, 2001, the Trial Court considered the pending motions. The Trial Court declined to hold the case in abeyance and denied Plaintiff's motion to amend the complaint and his motion for non-suit. As to Defendant's motion for summary judgment, the Court stated:

Plaintiff filed on November 8, 2001, Plaintiff's Response to Defendant's Motion to Dismiss and/or Motion for Summary Judgment, which the Court finds is insufficient as a matter of law. Due to the Plaintiff proceeding pro se, the Court will reserve ruling on Defendant's Motion to Dismiss and/or for Summary Judgment and allow Plaintiff until December 21, 2001, within which to file an appropriate response to Defendant's aforesaid Motion.

The Court calls Plaintiff's attention to TRCP Rule 56 and particularly 56.03 and Local Rule 12, a copy of which is attached

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<sup>3</sup> Apparently one juror indicated he had read or seen something about the case and was excused by the Judge after a hearing held outside the presence of the remaining prospective jurors.

hereto for Plaintiff's information and convenience. Plaintiff is cautioned that Plaintiff's response should be in compliance with applicable rules of procedure and the law. Plaintiff shall file the original of his Response with the Law Court Clerk's Office and forward a copy to the Court at its chambers at Kingsport City Hall, 225 West Center Street, Kingsport, TN 37660. Defendants shall respond to Plaintiff's pleadings by January 4, 2002. The Court will then consider Plaintiff's aforesaid Motion.

After Plaintiff filed another response to Defendant's motion for summary judgment, the Trial Court ruled on Defendant's motion in April of 2002. The Trial Court concluded Plaintiff failed to allege any policy, procedure, or custom on the part of the City of Kingsport that in any way impaired Plaintiff's civil rights. The Trial Court stated it had thoroughly read the relevant portions of the criminal trial transcript and observed the jurors in that trial had not read or did not recall reading the newspaper article at issue. Plaintiff could not direct the Trial Court to any part of that transcript which would indicate the newspaper article in any way impacted on the fairness of his criminal trial. The Trial Court went on to state how the Judge in the criminal trial took "careful efforts" in questioning the potential jurors about whether they had read any newspaper articles, etc. As to the claim for defamation, libel and slander, the Trial Court noted Plaintiff failed to state a cause of action for such claims against Defendant in his official capacity pursuant to the Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-205(2) and, further, Plaintiff's conviction for the rape and burglary prohibited such claims. Accordingly, the Trial Court granted Defendant's motion for summary judgment.

Plaintiff appeals raising two issues, which we quote: 1) Whether the Trial Court erred in refusing to afford [Plaintiff] an opportunity for discovery prior to ruling on [Defendant's] motions to dismiss and for summary judgment; and 2) Whether the Trial Court erred in granting the [Defendant's] motions to dismiss and for summary judgment. Plaintiff appeals neither the Trial Court's refusal to hold the case in abeyance nor its denial of Plaintiff's motions to amend his complaint and to take a non-suit.

### **Discussion**

The standard for review of a motion for summary judgment is set forth in *Staples v. CBL & Associates, Inc.*, 15 S.W.3d 83 (Tenn. 2000):

The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. See *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South*, 816

S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *See Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that its motion satisfies these requirements. *See Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn. 1991). When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *See Byrd v. Hall*, 847 S.W.2d at 215.

To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. *See McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. *See McCarley v. West Quality Food Serv.*, 960 S.W.2d at 588; *Robinson v. Omer*, 952 S.W.2d at 426. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. *See Robinson v. Omer*, 952 S.W.2d at 426; *Byrd v. Hall*, 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

*Staples*, 15 S.W.3d at 88-89. A fact is "material" for summary judgment purposes, if it "must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Luther v. Compton*, 5 S.W.3d 635, 639 (Tenn. 1999)(quoting *Byrd v. Hall*, 847 S.W.2d at 211).

First, we will discuss Plaintiff's claim the Trial Court erred in "refusing" to afford him an opportunity for discovery. As set forth above, Plaintiff filed two sets of interrogatories and requests for production of documents. While Defendant responded to the first set, the second set never was answered. It is Defendant's failure to respond to this second set of discovery which forms the basis for Plaintiff's argument on appeal.

The motion for summary judgment was decided by the Trial Court on April 4, 2002, over three years after this litigation began. Plaintiff never filed an affidavit setting forth why he needed additional time for discovery or why this discovery had not been completed prior to the ruling on the motion for summary judgment. Based on the record before us, it does not appear this claimed need for additional discovery ever was brought to the attention of the Trial Court after the motion for summary judgment was filed.

Rule 56.07 of the Tenn. R. Civ. P. provides as follows:

**56.07. When Affidavits Are Unavailable.** – Should it appear *from the affidavits of a party* opposing the motion that such party cannot for reasons stated present by affidavit facts essential to justify the opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. (emphasis added).

Plaintiff did not file an affidavit in accordance with Rule 56.07 prior to the ruling on the motion, or at least there is no such affidavit contained in the record on appeal. There is nothing in the record before us to indicate Plaintiff did not have sufficient time for meaningful discovery during the more than three years this case was pending. Defendant's failure to respond to Plaintiff's second set of interrogatories and requests for production of documents does not change this fact in light of Plaintiff's ability to file a motion to compel discovery pursuant to Rule 37, an option he chose not to pursue.<sup>4</sup> We find nothing in the record to indicate the Trial Court ever "refused" to grant Plaintiff additional discovery or an opportunity for additional discovery.

For reasons unknown to us, Plaintiff's response to Defendant's motion for summary judgment is not contained in the record. If Plaintiff did file a Rule 56.07 affidavit and it simply is not part of the record, then Plaintiff has failed in his duty to adequately prepare the record. Under Tenn. R. App. P. 24, the appellant has the duty "to prepare a record which conveys a fair, accurate and complete account of what transpired in the trial court with respect to the issues which form the basis of the appeal." *Nickas v. Capadalis*, 954 S.W.2d 735, 742 (Tenn. Ct. App. 1997) (quoting *State v. Boling*, 840 S.W.2d 944, 951 (Tenn. Crim. App. 1992)). In the absence of an adequate

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<sup>4</sup> Defendant's failure to respond to this discovery certainly would have been a consideration in determining whether to grant more time for discovery had Plaintiff actually asked for more time to conduct discovery and included Defendant's failure to respond in a Rule 56.07 affidavit.

record on appeal, this Court will presume the trial court's rulings were supported by sufficient evidence. *State Dep't of Children's Serv. v. D.G.S.L.*, E2001-00742- COA-R3-JV, 2001 Tenn. App. LEXIS 941, at \* 27 (Tenn. Ct. App. Dec. 28, 2001), *no appl. perm. app. filed*; *State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). For all of these reasons, we conclude Plaintiff's first issue on appeal is without merit.

Plaintiff's next issue is whether the Trial Court erred in granting Defendant summary judgment. In his brief, Plaintiff makes one argument which relates to the finality of his criminal case. Specifically, Plaintiff argues his criminal case is not "final" because the various appeals have not been exhausted. In his appeal of his criminal conviction, Plaintiff challenges the admissibility of the DNA results. Plaintiff asserts that if he is successful on appeal with this argument, the criminal conviction will be reversed and he will not be deemed the rapist. We note the Court of Criminal Appeals has affirmed the admissibility of this DNA evidence, Plaintiff's conviction for aggravated rape and aggravated burglary, as well as the effective sentence of fifty-five (55) years in prison. Plaintiff has, however, filed a Tenn. R. App. P. 11 application for permission to appeal to the Tennessee Supreme Court, which is currently pending.

As to Plaintiff's claim pursuant to 42 U.S.C. § 1983, given the fact the criminal court judge thoroughly questioned the prospective jurors on whether they had read any newspaper articles, and none of the jurors actually selected had read (or specifically remembered reading) the article, any potential negative affect on the fairness of Plaintiff's criminal trial resulting from the newspaper article was eliminated. We, therefore, affirm the Trial Court's judgment on this issue.

As to the defamation claim, the Trial Court granted summary judgment to Defendant for two reasons: First, the Trial Court concluded the claim was barred by the Governmental Tort Liability Act; and second, the newspaper article was true in light of Plaintiff's conviction for rape. In his brief, Plaintiff does not challenge the applicability of the Governmental Tort Liability Act, which specifically applies to municipalities. *See* Tenn. Code Ann. §29-20-102(3). Plaintiff sued Defendant only in his official capacity. Plaintiff attempted to amend the complaint and sue Defendant individually, but this request was denied and Plaintiff has not appealed that ruling. A suit against a governmental official in his official capacity is no different from a suit against the governmental entity itself. *See, e.g., Will v. Michigan Dept. Of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed.2d 45 (1989) ("Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather a suit against the official's office.... As such, it is no different from a suit against the state itself."). The Governmental Tort Liability Act specifically prohibits claims against a governmental entity for, among other things, "libel" and "slander". Tenn. Code Ann. § 29-20-205(2). Since Plaintiff's defamation claim actually is a claim for libel and/or slander against the City of Kingsport, it is barred

by Tenn. Code Ann. § 29-20-205(2). Accordingly, the Trial Court properly granted summary judgment to Defendant on this claim.<sup>5</sup> The remaining issues are, thus, pretermitted.

### **Conclusion**

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for further proceedings, if any, consistent with this Opinion and for collection of the costs below. Costs on appeal are assessed against the Appellant, Allan P. Bly, and his surety, if any.

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D. MICHAEL SWINEY, JUDGE

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<sup>5</sup> Whether or not Defendant could be sued in an official capacity pursuant to 42 U.S.C. § 1983 was never raised in the Trial Court.